

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Examiner: C. J. HALL; Art Unit: 3743; Docket No.: 3564

In RE: U.S. National Stage Application of Klaus WORGULL, et al

Ser. No.: 10/563,392

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July 29, 2011

APPEAL BRIEF

Hon. Commissioner for Patents,
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

In response to the final Office Action mailed on March 30, 2011 and the advisory action mailed on May 20, 2011, please consider the following arguments for overturning the rejections of pending claims 3 to 6 and 9 to 14 of the above-identified U.S. Patent Application:

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I. REAL PARTY IN INTEREST

The real party in interest is WELLA AG, of Darmstadt, Germany.

II. RELATED APPEALS AND INTERFERENCES

There are no related appeals and interferences.

III. STATUS OF THE CLAIMS

1. The claims on appeal are claims 3 to 6 and 9 to 14.
2. Claims 1, 2, 7, and 8 have been canceled; claims 3 to 6 and 9 to 14 are pending.
3. Claims 13 and 10 stand rejected under 35 U.S.C. § 102 (b) as anticipated by US Patent No. 4,232,454, Springer.
4. Claim 11 stands rejected as unpatentable under 35 U.S.C. § 103 (a) over US Patent No. 4,232,454, Springer, and further in view of US 5,349,147, Gallone.
5. Claims 13, 3 to 6, and 9 stand rejected as unpatentable under 35 U.S.C. § 103 (a) over US Patent 5,727,331, Thaler, et al, in view of US 4,711,988, Thaler, et al, and further in view of JP 03 009 703 A, Kaeriyama.
6. Claim 10 stands rejected as unpatentable under 35 U.S.C. § 103 (a) over US Patent 5,727,331, Thaler, et al, in view of US 4,711,988, Thaler, et al, and further in view of JP 03 009 703 A, Kaeriyama, and further in view of US

Patent 4,676,260, Paulhus, et al.

7. Claim 11 stands rejected as unpatentable under 35 U.S.C. § 103 (a) over US Patent 5,727,331, Thaler, et al, in view of US 4,711,988, Thaler, et al, and further in view of JP 03 009 703 A, Kaeriyama, and further in view of US 5,349,147, Gallone.

8. Claim 12 stands rejected as unpatentable under 35 U.S.C. § 103 (a) over US Patent 5,727,331, Thaler, et al, in view of US 4,711,988, Thaler, et al, and further in view of JP 03 009 703 A, Kaeriyama, and further in view of US Patent 3,612,824, Berryman.

9. Claim 14 stands rejected as unpatentable under 35 U.S.C. § 103 (a) over US Patent 5,727,331, Thaler, et al, in view of US 4,711,988, Thaler, et al, and further in view of US Patent 3,612,824, Berryman.

IV. STATUS OF AMENDMENTS

1. An amendment after final action including proposed claim changes was filed in the U.S. Patent Office on May 9, 2011.

2. An advisory action in response to the amendment after final action was mailed on May 20, 2011. It stated that the proposed claim changes would be entered, but that the arguments, although fully considered, did not put the application in a condition for allowance.

V. SUMMARY OF THE CLAIMED SUBJECT MATTER

The page and line numbers, drawing reference characters and figure numbers in parentheses in the following summary of the claimed subject matter refer to the location of the associated subject matter in the appellants' originally filed English translation of the specification. The page numbers are numbered from the first page of the written description (the Certification of Translation is not page 1).

A. Independent Claim 13

Claim 13 claims a hand-held hair dryer 1, examples of which are shown in figs. 7 to 9. Another example of the hand-held hair dryer 1 is shown in fig. 1, except that the first cold air switch 10 and the second cold air switch 11 of the embodiment shown in fig. 1 are replaced by a single cold air combination switch 16, 16.1, 16.2 in the case of the embodiments shown in figs. 7 to 9 (see page 6, line 11, to Page 7, line 6, of applicants' originally filed specification). Thus some elements of claim 13 are disclosed and described on page 3, line 9, to page 4, line 10, of the English translation in connection with fig. 1, in accordance with e.g. p. 6, l. 11 to 12.

Accordingly the claimed hand hair dryer of claim 13 comprises a housing portion 6 (p. 3, l. 11) containing an electric fan 2 (p. 3, l. 9 & 11) for generating an air stream 4 (p. 3, l. 10); a barrel portion 5 (p. 3, l. 10 - 12) containing an electric heater 3 (p. 3, l. 11) and connected to the housing portion 6 at an angle of approximately 90° (p. 3, l. 13-14) and a first handle grip 8 (p. 3, l. 12-13) connected to the housing portion 6 (see the last paragraph on page 3, lines 9 to last line, of the English translation).

The first handle grip 8 advantageously has operator control elements 7 (p. 3, l. 12-13). Furthermore in the embodiments disclosed on pages 6 and 7 of the appellants' English translation of the specification the switches 10 and 11 are replaced by a single first cold air combination switch 16, 16.1, 16.2 (p. 6, l. 11-15, l. 17-21; p. 7, l. 3-6; figs. 6 to 9). The single first cold air combination switch is located only on the housing portion 6 between the first handle grip 8 and the barrel portion 5 in the angle formed between them and configured so that it can be actuated by a finger of a hand gripping either the first handle grip or the second handle grip (p. 6, l.12-15 & l.17-20).

A key limitation of claim 13 is that the second handle grip 9 is insulated from the heater to prevent the second handle grip from becoming hot during use -- so that a hand can comfortably grip the second handle grip even when the heater is operating to produce a hot air stream (p. 4, l. 1-4).

B. Independent Claim 14

Claim 14 claims a hand-held hair dryer 1, examples of which are shown in figs. 7 to 9. Another example of the hand-held hair dryer 1 is shown in fig. 1, except that the first cold air switch 10 and the second cold air switch 11 of the embodiment shown in fig. 1 are replaced by a single cold air combination switch 16, 16.1, 16.2 in the case of the embodiments shown in figs. 7 to 9 (see page 6, line 11, to Page 7, line 6, of applicants' originally filed specification). Thus some elements of claim 14 are disclosed and described on page 3, line 9, to page 4, line 10, of the English translation in connection with fig. 1 (see p. 6, l. 11 and following).

Accordingly the claimed hand hair dryer of claim 14 comprises a housing portion 6 (p. 3, l. 11) containing an electric fan 2 (p. 3, l. 9 & 11) for generating an air stream 4 (p. 3, l. 10); a barrel portion 5 (p. 3, l. 10 - 12) containing an electric heater 3 (p. 3, l. 11) and connected to the housing portion 6 at an angle of approximately 90° (p. 3, l. 13 - 14) and a first handle grip 8 (p. 3, l. 12 - 13) connected to the housing portion 6 (see the last paragraph on page 3, lines 9 to last line, of the English translation).

The first handle grip 8 advantageously has operator control elements 7 (p. 3, l. 12 - 13). Furthermore in the embodiments disclosed on pages 6 and 7 of the appellants' English translation of the specification the switches 10 and 11 are replaced by a single first cold air combination switch 16, 16.1, 16.2 (p. 6, l. 11 - 15, l. 17 - 21; p. 7, l. 3 - 6; figs. 6 to 9). The single first cold air combination switch is located only on the housing portion 6 between the first handle grip 8 and the barrel portion 5 in the angle formed between them and configured so that it can be actuated by a finger of a hand gripping either the first handle grip or the second handle grip (p. 6, l. 12 - 15 & l. 17 - 20).

Advantageously the hand hair dryer of claim 14 has a centrally located warm-air conduit 28 and a coaxial cold-air conduit 29 in the barrel portion 5 (see fig. 9 and p. 7, l. 8 - 13). Additionally according to claim 14 the warm-air conduit 28 is formed by a hollow-cylindrical barrel 30 in which the heater 3 is located (p. 7, l. 10 - 11 & fig. 9). Also the coaxial cold-air conduit 29 extends between the barrel portion 5 and the hollow-cylindrical barrel 30 (fig. 9, last paragraph on page 7).

The placement of the coaxial cold-air conduit outside of the warm-air conduit provides an advantageous insulating effect on the handle grip on the barrel 5 when the heater is operated so that it is protected to some extent from heat up by the hot air stream from the heater. The central warm-air

conduit 28 and the coaxial cold-air conduit 29 are acted on by the cold air stream 31 from the fan 2 but when the heater 3 operates a warm air stream outlet 32 out of the central warm-air conduit 29 and a cold air stream 33 out of the coaxial cold-air conduit 29 are effected (p. 7, l. 13 to 18).

C. Separately Argued Dependent Claims

1. Claim 11

According to claim 11 the cold-air combination switch is a two-legged toggle switch (p. 7, l. 3 to 6; fig. 8). This form of the switch is operable with an operator's hand gripping either the first handle grip or the second handle grip.

2. Claim 10

According to claim 10 the cold-air combination switch is a one-legged toggle switch (p. 6, l. 18 to 21; fig. 7). This form of the switch is operable with an operator's hand gripping either the first handle grip or the second handle grip.

3. Claim 12

The subject matter of claim 12 is exactly the same as claim 14 and thus the above subsection B points out the location of disclosure in applicants' written description and figures that support claim 12.

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

1. Whether or not claims 13 and 10 are anticipated under 35 U.S.C. § 102 (b) by US Patent No. 4,232,454, Springer.
2. Whether or not claim 11 is unpatentable under 35 U.S.C. § 103 (a) over US Patent No. 4,232,454, Springer, and further in view of US 5,349,147, Gallone.
3. Whether or not claims 13, 3 to 6, and 9 are unpatentable under 35 U.S.C. § 103 (a) over US Patent 5,727,331, Thaler, et al, in view of US 4,711,988, Thaler, et al, and further in view of JP 03 009 703 A, Kaeriyama.
4. Whether or not claim 10 is unpatentable under 35 U.S.C. § 103 (a) over US Patent 5,727,331, Thaler, et al, in view of US 4,711,988, Thaler, et al, and further in view of JP 03 009 703 A, Kaeriyama, and further in view of US Patent 4,676,260, Paulhus, et al.
5. Whether or not claim 11 is unpatentable under 35 U.S.C. § 103 (a) over US Patent 5,727,331, Thaler, et al, in view of US 4,711,988, Thaler, et al, and further in view of JP 03 009 703 A, Kaeriyama, and further in view of US 5,349,147, Gallone.

6. Whether or not claim 12 is unpatentable under 35 U.S.C. § 103 (a) over US Patent 5,727,331, Thaler, et al, in view of US 4,711,988, Thaler, et al, and further in view of JP 03 009 703 A, Kaeriyama, and further in view of US Patent 3,612,824, Berryman.

7. Whether or not claim 14 is unpatentable under 35 U.S.C. § 103 (a) over US Patent 5,727,331, Thaler, et al, in view of US 4,711,988, Thaler, et al, and further in view of US Patent 3,612,824, Berryman.

VII. ARGUMENTATION

A. Rejection of Claims 13 and 10 under 35 U.S.C. § 102 (b) by Springer

Claims 13 and 10 were rejected under 35 U.S.C. § 102 (b) as anticipated by US Patent No. 4,232,454, Springer.

The features of independent apparatus claim 13 that distinguish the claimed hair dryer from the prior art include:

- A. "said barrel portion (5) is embodied as a second handle grip (9) that is insulated from the heater (3) to prevent said second handle grip (9) from getting hot during use"; and
- B. "said cold air combination switch (16, 16.1, 16.2) is configured to be actuated selectively from the first or second handle grip (8, 9) by direct contact between the cold air combination switch and one finger of a hand on either the first handle grip (8) or the second handle grip (9)".

The first limitation A means that the barrel portion is limited to a second handle grip that is insulated from the heater 3 (inside of it) to prevent it from getting hot during use. The wording "to prevent said second handle grip from getting hot during use" is a **functional limitation** that determines the extent

to which the barrel portion is insulated from heat generated by the heater when it is operated.

According to the Advisory Action claims directed to an apparatus must be distinguished from the prior art by structure rather than function. This is an out-of-context and somewhat misleading portion of the *In re Schreiber* decision quoted in M.P.E.P. § 2112 and § 2114. Functional limitations at the point of novelty are acceptable in claims of all statutory classes according to M.P.E.P. § 2173.05 (g) and can be effective in distinguishing the claimed subject matter from the prior art.

In the case of *In re Schreiber* the court found a prior patent that disclosed a conical spout that *inherently* performed the same function that the applicants in *In re Schreiber* asserted distinguished their claimed apparatus. The Court provided evidence of the inherency in the form of an embodiment disclosed in the prior art (Harz, fig. 5) in which the conical spout was shaped like one of the embodiments shown in the application (Schreiber, fig. 1). See M.P.E.P. § 2112. In other words, the prior art disclosed an embodiment with a structure which fell within the scope of the Schreiber claims, which would be sufficient for an anticipation rejection.

Appellants' situation is distinguishable from the situation in the case of *In re Schreiber* because the appellants' limitation is a structural limitation: the barrel is insulated sufficiently effectively so that the second handle grip does not get hot during use -- according to the current wording of claim 13. It is common knowledge that the barrel of a conventional hair dryer of the prior art will be heated when you turn on the heater because the user wants a stream of hot air and the hot air heats the barrel. According to appellants' claim 13 their hair dryer is actively structured differently from the conventional hair dryer, because it is insulated sufficiently effectively so that the barrel does not get hot. Accordingly the user can comfortably grasp the hair dryer by the barrel. Thus there is a real difference between the dryer of Springer and the appellants' dryer, because the appellants' hair dryer has an insulated barrel.

In contrast to appellants' disclosure, Springer does not disclose any type of thermal insulation or thermally insulating material on any portion of the barrel of their dryer. Springer does not disclose, teach, or suggest any means of effectively thermally insulating the barrel in order to prevent the barrel from heating up during operation of the heater. No material having a thermal insulating property is disclosed by Springer.

The Examiner asserts that thermal insulation is provided by doors 112 and 113, but these doors are not disclosed as having an insulating effect or

are made of an insulating material according to Springer. The doors 112 and 113 can be partially closed to the dotted position shown in fig. 2 to provide the essential novel function that resulted in the granting of a patent in the case of Springer, which is a variable control of the speed of the heated air stream issuing from the outlet 105 of the hair dryer of Springer. However they would not have any effect on the temperature along the outside of the barrel in the vicinity of the heater in the hair dryer of Springer, because fig. 2 clearly shows that the heater 116 is in contact with the barrel wall and fig. 3 clearly shows that heater 116 extends across the entire interior of the non-flared portion of the barrel portion 110 upstream of the doors 112, 113, so that the barrel wall would clearly be heated efficiently by conduction from the heater 116 (Heater elements 120 are mounted directly on the barrel wall and in physical contact with it). Heat would also be conducted through the material of the barrel wall from the heater toward the outlet of the hair dryer so that the doors 112 and 113 would have only a secondary effect in cooling the barrel wall downstream of the heater. Furthermore in some cases the user of the hair dryer would prefer to operate the hair dryer of Springer with the doors 112 and 113 fully open.

Furthermore the means for adjusting the position of the doors comprises a knob 111 mounted on the outside of the barrel portion in about the middle of the barrel (The claims of Springer are limited to this structure).

See column 4, lines 15 – 20, and column 3, lines 64 – 67, of Springer. This knob would interfere with a user who wanted to grip the barrel portion instead of the handle of the dryer of Springer. Also its presence clearly shows that the barrel of Springer is not designed as an alternative handle grip.

Also the embodiment shown in figs. 1 and 3 of Springer has a front flaring section that would be difficult to grip because of its sharp edges and awkward dimensions. A person gripping this part of the dryer with one hand would find holding it physically difficult to use it and also hold on to it.

How would one grip the barrel and simultaneously adjust the knob 111? Often the hair dresser or the user will have another item in their other hand, such as a comb or the like, and in that case it would not be possible to adjust the hair dryer of Springer while gripping the hair dryer by the barrel and combing the hair.

Furthermore the required presence of the knob and flaring section of the barrel portion forces the user to grasp the barrel portion, if he desires to hold it by the barrel, exactly over the heater 116 and heater elements 120 where the temperature of the barrel will be at a maximum due to heat conduction from the heater 116. This suggests that there is no motivation or

suggestion in Springer for one skilled in the art to embody the barrel as a second handle grip as required by appellants' claim 13.

The disclosures in Thaler and Kaeriyama are not applicable as extrinsic evidence of inherency in the case of Springer, because they do not have the barrel structure that is required by the claims of Springer; those other references do not have the interfering knob 111 and interior doors 112 and 113 that the claims of Springer require. Also the barrels on the hair dryers of Thaler and Kaeriyama do not have the preferred rectangular cross-section and flaring barrel shape (see fig. 1) that is required in order to provide the disperse air flow (column 4, lines 21 to 28, of Springer) when the knob 111 is properly adjusted, but which make the barrel difficult to grasp and hold with a hand of a user.

Furthermore, as noted above, no intrinsic evidence is present in Springer (or has been presented in any of the Office Actions) that suggests that their barrel portion could be configured as a second handle grip that is insulated so that the heater will not heat it so that it is hot during operation of the heater.

The barrel of the hair dryer of Springer, as required by the claims of Springer and shown in their figures, has exactly the wrong structure for a

second handle grip because of the placement of the knob 111 for adjusting the doors 112 and 113 and of the heater 116. Thus it is unreasonable to read in the limitation that the barrel portion of Springer is embodied as an insulated handle grip that is sufficiently insulated so that it does not get hot when the heater is operated. The evidence presented above shows that it is not structured so that it could be embodied in that way.

Thus it is respectfully submitted that the feature:

“said barrel portion (5) is embodied as a second handle grip (9) that is insulated from the heater (3) to prevent said second handle grip (9) from getting hot during use”

is not present in the hair dryer described in the written description of Springer and claimed in Springer, either inherently or expressly. Furthermore it should be apparent because of the limited claims of Springer that this feature is never present in any of the embodiments of the claimed hair dryer of Springer; it is not simply a matter of a property or characteristic of a few embodiments of their claimed hair dryer because their claims require a structure that provides a barrel portion that is difficult to grip and hold and not insulated from the heater.

With respect to giving limitations “little patentable weight” during examination it is well to remember that the Office requires that all limitations

of a claim be given patentable weight, even indefinite limitations, during examinations. See M.P.E.P. § 2143.03. It is difficult to understand how limiting wording can be given variable patentable weight; wording or phases in a claim either limit the claim scope or not and, if not, reasons should be provided that the wording has no patentable weight.

Regarding the feature:

“said cold air combination switch (16, 16.1, 16.2) is configured to be actuated selectively from the first or second handle grip (8, 9) by direct contact between the cold air combination switch and one finger of a hand on either the first handle grip (8) or the second handle grip (9)”.

note that these limitations require the switch 16, 16.1 etc to be operable with one finger of a hand that either grips the first handle grip 8 or the second handle grip 9. If a hand gripped the barrel 110 of the hair dryer of Springer on the portion of the barrel in which the heater 116 is contained, their switch 117 is not accessible to one of the fingers of the gripping hand without releasing the grip of the hand on the barrel because of the shoulder on which the switch 117 is mounted and the direction in which the button on switch 117 must be pressed (see figs. 1 & 2 of Springer). This is in contrast to applicants' figs. 6 to 9 which show embodiments in which the switch, especially a toggle switch, is easily accessible for a finger of a hand gripping the barrel of the appellants' hair dryer.

Thaler '331 specifically points out the problem with the placement of the switches that control the dryer in situations where the user grips the dryer by the barrel or barrel portion at column 1, lines 36 to 42:

"This requires that a user switch grips in the middle of drying hair to change the air flow rate or temperature. Alternatively, the hand not holding the dryer must be used to change the air flow rate or temperature. This is not practical because the user's other hand is generally performing hair styling activities."

In the case of switch 117 one must either operate the switch from the hand gripping handle 119 or one must use the hand that is not gripping the barrel to operate the switch 117 because of the vertical orientation of the button of the switch (which requires a vertical pressing force) and the location of the switch in the housing between the handle and the barrel, since a shoulder of the housing would block access of a finger of the hand gripping the barrel.

For the aforesaid reasons Honorable Board of Patent Appeals and Interferences is respectfully requested to overturn the rejection of claims 13 and 10 as anticipated under 35 U.S.C. § 102 (b) by US Patent No. 4,232,454, Springer.

**B. Rejection of Claim 11 under 35 U.S.C. § 103 (a) based on
Springer and Gallone**

Claim 11 was rejected as unpatentable under 35 U.S.C. § 103 (a) over US Patent No. 4,232,454, Springer, and further in view of US 5,349,147, Gallone.

Claim 11 claims a toggle switch, not a switch with push buttons. Webster's dictionary contains a definition of "toggle switch". The definition has a single meaning for "toggle switch", which is an electric switch operated by pushing a projecting lever through a small arc. Clearly this term "toggle switch" is distinguishable from a switch with push buttons. The latter push button switch is the only switch disclosed in Gallone.

Furthermore a toggle switch with a lever is easier to operate by the finger of a gripping hand holding the barrel, because it takes comparatively less force to switch and the force can be directed from the side of the switch. This contrasts to the push buttons of Springer which are oriented in the wrong direction for the finger of a gripping hand so that they are not easily operated by a single finger that would approach the switch from the side.

Gallone only discloses a water-splash protected electric switch with two push buttons. The elements 15 are transmission elements for transmitting the force applied to the push buttons.

The combined subject matter of Gallone and Springer clearly does not anticipate the subject matter of claim 11, because Gallone teaches a push button switch, not a toggle switch, which has definite advantages in the case of the applicants' application.

Second Gallone teaches nothing regarding hair dryer structure, because Gallone only discloses the water-splash protected electric switch.

For the aforesaid reasons Gallone cannot cure the deficiencies of Springer regarding the lack of disclosure of Springer of the critical limitations in claim 13, namely:

- A. "said barrel portion (5) is embodied as a second handle grip (9) that is insulated from the heater (3) to prevent said second handle grip (9) from getting hot during use"; and
- B. "said cold air combination switch (16, 16.1, 16.2) is configured to be actuated selectively from the first or second handle grip (8, 9) by direct contact between the cold air combination switch and one finger of a hand on either the first handle grip (8) or the second handle grip (9)".

There is no motivation or suggestion in Gallone of the modifications of the subject matter of Springer that are necessary to arrive at the hair dryer according to claim 11, which would be to insulate the barrel of Springer and select and position a toggle switch for the cold air at the juncture between the barrel and the conventional handle (first handle grip). One test of obviousness is whether the secondary references provide the motivation or suggestion necessary to modify the prior art disclosures of the primary reference in order to arrive at the claimed invention. For example, the Federal Circuit Court of Appeals has said:

"Rather, to establish obviousness based on a combination of elements disclosed in the prior art, there must be some motivation, suggestion or teaching of the desirability of making the specific combination that was made by the applicant...Even when obviousness is based on as single reference there must be a showing of a suggestion of motivation to modify the teachings of that reference.." *In re Kotzab*, 55 U.S.P.Q. 2nd 1313 (Fed. Cir. 2000). See also M.P.E.P. 2141

Furthermore the disclosures in Springer regarding the preferred hair dryer shape and structure, especially of the barrel, lead one skilled in the art away from the claimed invention according to claim 13 (and thus claim 11), because the barrel of Springer has an additional element knob 111 (required by their claims) and has a rectangular cross-section and edges, which are comparatively sharp so that it is unsuitable for a second handle grip.

It is established that a prior art reference that teaches away from a claimed invention should not be combined with other prior art references to reject the claimed invention as obvious. On the elements of teaching away from a claimed invention, the Federal Circuit Court of Appeals has said (as quoted in *In re Kubin* 561 F.3d 1351, Fed. Cir. 2009):

"A reference may be said to teach away when a person of ordinary skill, upon reading the reference, would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that was taken by the applicant."
In re Gurlev, 27 F.3d 551, 553 (Fed. Cir. 1994).

Furthermore when the combined subject matter of claims 11 and 13 is considered in view of the combined subject matter disclosed in the prior art, which is required according to M.P.E.P. § 2141.02 (the claimed invention must be considered "as a whole"), it should be apparent that the combined subject matter provides unusual and unexpected benefits compared to the combined prior art. The selection of a toggle switch for the cold air flow switch at the juncture between the conventional handle and the barrel of the dryer provides special benefits and advantages for those who want to hold the dryer by the barrel but manipulate the control switches, particular for the air flow, with a single finger of the hand that grips the barrel. Thus the combination of the toggle switch, its placement, and the insulation provided

on the barrel provide a dryer with unexpected advantages for those who want to hold the dryer by the barrel while styling the hair with the dryer.

For the aforesaid reasons Honorable Board of Patent Appeals and Interferences is respectfully requested to overturn the rejection of claim 11 as unpatentable under 35 U.S.C. § 103 (a) over US Patent No. 4,232,454, Springer, and further in view of US 5,349,147, Gallone.

C. Rejection of Claims 13, 3-6, and 9 under 35 U.S.C. § 103 (a)

Claims 13, 3 to 6, and 9 were rejected as unpatentable under 35 U.S.C. § 103 (a) over US Patent 5,727,331, Thaler, et al, in view of US 4,711,988, Thaler, et al, and further in view of JP 03 009 703 A, Kaeriyama.

Appellants argue that the rejected claims are patentable over the cited references, because the references, neither alone nor in combination, teach or suggest a single cold air combination switch **configured to be** (this is a structural limitation because the single switch is structured to perform the function following this wording) actuated selectively from the first or second handle grip by direct contact between the single switch and one finger of a hand on either the first or second handle grip. In other words, it does not matter whether it is the first or the second handle grip that is gripped by the

hand; one finger of that hand is still in a respective position to operate the single switch by direct contact with it.

The rejection in the final action relies upon Thaler '331 as teaching a dryer comprising a cold air combination switch configured to be actuated selectively from the first or second handle grip by direct contact between switch and one finger of a hand on either the first or second handle grip.

In response to the appellants' arguments regarding fig. 5 of Thaler '331, the advisory action states that the rejection is based on fig. 1 of Thaler '331, not fig. 5. The advisory action quotes from the "Response to Arguments" in the final action as follows:

"While figure 5 of Thaler '331 does show two electrically wired cold air combination switches 127, 120, figure 1 shows a single electrically wired cold air combination switch 20".

Appellants respectfully submit that this statement is **not** correct or at least misleading, because Thaler '331 explicitly teaches that their hair dryers have two switches to control air flow rate or temperature in their summary of the invention in column 1, which is generic for all embodiments disclosed in Thaler '331. Column 1, line 55 and following state: The first switch is located at the trigger position and the second switch is located on the barrel. Also see claim 1 of Thaler '331 which claims a hair dryer with the first and second

switches (excluding hair dryers with a single combination switch). As shown in fig. 1 herein below the hair dryer of fig. 1 has two switches a simple trigger switch 20 that can be activated from handle 11 and a mechanically operable (pivotable) switch 21, 23, 24 engaged with the trigger switch that can be operated by a hand gripping the barrel as shown in fig. 4 of Thaler '331.

The generic summary of the invention in column 1, lines 44 to 60, and claim 1 of Thaler '331 are evidence that Thaler considers the elements 21, 23, and 24 part of a separate mechanical switch for triggering the trigger switch 20 in fig. 1. The term "switch" in claim 13 must be given its broadest possible interpretation. A switch may be entirely mechanical in nature (such as a railroad track switch). Hence the interpretation of elements 21, 23, and 24 as a mechanical switch for operating the trigger switch 20 should be given weight in these arguments.

The embodiments shown in fig. 1 are not different from the embodiments shown in fig. 5 in this respect. Fig. 5 does show two separately electrically-wired switches, one 120 on the barrel and the other 127 on the handle. However appellants' claim 13 does not merely exclude two separately electrically-wired switches for cold air flow, but excludes any two switches for controlling air flow, whether they are electrically-wired separately or not. Applicants' claim 13 is limited to a **single** switch for controlling cold air flow

that is controllable by the finger of a hand that grips either the first handle grip or the second handle grip. The embodiment of Figure 1 of Thaler '331 has a conventional trigger switch for controlling cold air flow placed on the handle and **a second switch mechanically coupled to the trigger switch**

Thaler '331 and the present invention both provide a solution to the ergonomic problem encountered when holding a dryer alternately by the barrel and pistol grip of the dryer during use. Unlike the present invention, **the solution provided by Thaler '331 is based upon two cold-air combination switches or** by allowing an operator holding the hair dryer by the barrel to actuate a conventionally placed cold-air combination trigger switch **by way of a second switch mechanically coupled to the trigger switch.** From Thaler '331:

A disadvantage of the known hair dryers is that they do not allow users to control air flow rate and temperature when holding the dryer in different positions, such as by either the handle or barrel. This requires that a user switch grips in the middle of drying hair to change the air flow rate or temperature. Alternately, the hand not holding the dryer must be used to change the air flow rate or temperature. This is not practical because the user's other hand is generally performing hair styling activities.

The present invention alleviates to a great extent these disadvantages by providing a hair dryer including more than one switch to control air flow rate or temperature. Each switch is

located on a different portion of the hair dryer, allowing the user to select air flow rate or temperature when gripping the dryer in different ways. This allows an operator to control air flow rate or temperature with the hand holding the dryer without requiring him to hold the dryer in a particular manner.

Thaler '331 **explicitly states** that the solution is *"providing a hair dryer including **more than one switch** to control air flow rate or temperature."* If the rejection is maintained, appellants respectfully request that the Examiner articulate how Thaler '331 can be interpreted as teaching a **single** cold-air combination switch in view of Thaler's explicit teaching to the contrary in column 1 and claim 1.

The invention recited in present claim 13 provides an altogether different solution to the same ergonomic problem addressed by Thaler '331. Claim 13 recites a dryer comprising a single cold air combination switch that is configured to be actuated by a single finger of a hand holding the dryer by either the barrel or the handle. Contrary to the Examiner's implication that the claim merely recites a function, **the invention recited in claim 13 is structurally different from the dryer taught by Thaler '331 because Thaler always requires two cold air combination switches and claim 13 recites a (i.e. single) cold air combination switch** configured in such a way that a second mechanical cold air switch is not needed.

One skilled in the art could not reasonably interpret the language recited in claim 13 as encompassing a dryer comprising two cold air combination switches as claimed in claim 1 of Thaler '331 and described in column 1 of Thaler '331, because the claim recites a single cold air combination switch.

Neither Thaler '988 nor Kaeriyama teach or suggest the claim limitation of a single cold air combination switch configured to be actuated selectively from the first or second handle grip by direct contact of the switch with one finger of a hand on either the first or second handle grip. Kaeriyama explicitly teaches more than one cold air combination switch (claim 1, first and second full paragraphs on page 5).

A prior art reference that teaches the opposite from a claimed invention should not be combined with other prior art references under 35 U.S.C. § 103 (a) to reject the claimed invention as obvious. See M.P.E.P. 2145. X and also the Federal Circuit Court of Appeals has said:

“That the inventor achieved the claimed invention by doing what those skilled in the art suggested should not be done is a fact strongly probative of nonobviousness.” in Kloster Speedsteel AB v. Crucible Inc., 230 U.S.P.Q. 81 (Fed. Cir. 1986), on rehearing, 231 U.S.P.Q. 160 (Fed. Cir. 1986)

Thaler '331 teaches the opposite from the claimed invention, because they require that their claimed hair dryer have two cold air flow controlling switching mechanisms, one that is operable from the conventional handle of the hair dryer and the other that is operable from the barrel and that can be operated by a hand that holds the hair dryer by the barrel instead of the conventional handle.

For the aforesaid reasons Honorable Board of Patent Appeals and Interferences is respectfully requested to overturn the rejection of claim 13, 3 to 6, and 9 as unpatentable under 35 U.S.C. § 103 (a) over US Patent 5,727,331, Thaler, et al, in view of US 4,711,988, Thaler, et al, and further in view of JP 03 009 703 A, Kaeriyama.

D. Rejection of Claim 10 under 35 U.S.C. § 103 (a) over Thaler '331, in view of Thaler '988, Kaeriyama, and Paulus, et al

Claim 10 was rejected as unpatentable under 35 U.S.C. § 103 (a) over US Patent 5,727,331, Thaler, et al, in view of US 4,711,988, Thaler, et al, and further in view of JP 03 009 703 A, Kaeriyama, and further in view of US Patent 4,676,260, Paulhus, et al.

Claim 10 claims a toggle switch, but one that controls cold air flow and that is located at the angle between the barrel and the first handle grip of the hair dryer (because it depends on claim 13). A toggle switch with a lever is easier to operate by the finger of a gripping hand holding the barrel, because it takes comparatively less force to switch and the force can be directed from the side of the switch.

Paulus does teach a switch 20 shown in fig. 1 that is a toggle switch, but it is clearly for turning the heater that heats the air stream on and off and it is located on the side of the housing, not at the angle between the first handle grip and the barrel. Paulus does have a variable trigger switch located at the latter location for controlling air flow, but strictly speaking it is not a toggle switch.

Accordingly the combined subject matter of Paulus and the references used to reject claim 13 as obvious does not directly result in the combined subject matter of appellants' claims 13 and 10. One must modify the combined subject matter of the prior art by replacing the cold air trigger switch of Thaler '331 by the toggle switch 20 of Paulus. There is no hint or suggestion of that modification in the prior art and hence the use of a toggle switch for appellants' single cold air flow switch is not obvious, especially in

view of the benefits it provides for operation by a hand gripping the barrel and also a hand gripping the conventional handle of the dryer.

Appellants understand that toggle switches are known in the electrical arts, but the issue here is whether or not the combined subject matter of claims 10 and 13 is obvious, not whether toggle switches are obvious switches to use in electrical devices.

In addition, Paulus does not provide the modifications of the combined prior art that were used to reject claim 13, which were necessary to arrive at the features of claim 13 with the critical limitation that the hair dryer has a single cold air combination switch **configured to be** actuated selectively from the first or second handle grip by direct contact between the single switch and one finger of a hand on either the first or second handle grip. Paulus discloses a conventional hair dryer in which the barrel has a heater throughout its entire extent that would heat the entire barrel wall and in which the barrel is not designed to provide a second handle grip.

Furthermore when the combined subject matter of claims 11 and 13 is considered in view of the combined subject matter disclosed in the prior art, which is required according to M.P.E.P. § 2141.02 (the claimed invention must be considered "as a whole"), it should be apparent that the combined

subject matter provides unusual and unexpected benefits in comparison to the combined prior art. The use and position of a toggle switch for the cold air flow switch at the juncture between the conventional handle and the barrel of the dryer provides special benefits and advantages for those who want to hold the dryer by the barrel but manipulate the control switches, particular for the air flow, with a single finger of the hand that grips the barrel. Thus the combination of the toggle switch for cold air flow, its placement, and the insulation provided on the barrel provide a dryer with unexpected advantages compared to the combined subject matter of the prior art, which uses the toggle switch for the heater that heats the air flow and does not position it at the juncture between the conventional handle and the barrel.

For the aforesaid reasons Honorable Board of Patent Appeals and Interferences is respectfully requested to overturn the rejection of claim 10 as unpatentable under 35 U.S.C. § 103 (a) over US Patent 5,727,331, Thaler, et al, in view of US 4,711,988, Thaler, et al, and further in view of JP 03 009 703 A, Kaeriyama, and further in view of US Patent 4,676,260, Paulhus, et al.

E. Rejection of Claim 11 under 35 U.S.C. § 103 (a) over Thaler '331, in view of Thaler '988, Kaeriyama, and Gallone

Claim 11 was rejected as unpatentable under 35 U.S.C. § 103 (a) over US Patent 5,727,331, Thaler, et al, in view of US 4,711,988, Thaler, et al,

and further in view of JP 03 009 703 A, Kaeriyama, and further in view of Gallone.

Claim 11 claims a toggle switch, not a switch with push buttons. Webster's dictionary contains a definition of "toggle switch". The definition has a single meaning for "toggle switch", which is an electric switch operated by pushing a projecting lever through a small arc. Clearly this term "toggle switch" is distinguishable from a switch with push buttons.

Furthermore a toggle switch with a lever is easier to operate by the finger of a gripping hand holding the barrel, because it takes comparatively less force to switch and the force can be directed from the side of the switch. This contrasts to the push buttons of Springer which are oriented in the wrong direction for the finger of a gripping hand so that they are not easily operated by a single finger when the gripping hand holds the barrel.

Gallone only discloses a water-splash protected electric switch with two push buttons. The elements 15 are transmission elements for transmitting the force applied to the push buttons.

The combined subject matter of Gallone with the prior art references used to reject claim 13 as obvious clearly does not anticipate the subject

matter of claim 11, because Gallone teaches a push button switch, not a toggle switch, which has definite advantages in the case of the applicants' application.

Second Gallone teaches nothing regarding hair dryer structure, because Gallone only discloses the water-splash protected electric switch.

For the aforesaid reasons Gallone cannot cure the deficiencies of the prior art used to reject claim 13 as obvious regarding the lack of disclosure of a critical limitation in claim 13, namely:

"said cold air combination switch (16, 16.1, 16.2) is configured to be actuated selectively from the first or second handle grip (8, 9) by direct contact between the cold air combination switch and one finger of a hand on either the first handle grip (8) or the second handle grip (9)".

There is no motivation or suggestion in Gallone of the modifications of the combined subject matter of Thaler '331, Thaler '988, and Kaeriyama, which would be to insulate the barrel of Thaler '331 and select a toggle switch for the cold air at the juncture between the barrel and the conventional handle (first handle grip) and which are necessary to arrive at the hair dryer according to claim 11. One test of obviousness is whether the secondary references provide the motivation or suggestion necessary to modify the prior

art disclosures of the primary reference in order to arrive at the claimed invention. For example, the Federal Circuit Court of Appeals has said:

"Rather, to establish obviousness based on a combination of elements disclosed in the prior art, there must be some motivation, suggestion or teaching of the desirability of making the specific combination that was made by the applicant...Even when obviousness is based on as single reference there must be a showing of a suggestion of motivation to modify the teachings of that reference.." *In re Kotzab*, 55 U.S.P.Q. 2nd 1313 (Fed. Cir. 2000). See also M.P.E.P. 2141

Furthermore Thaler '331 teaches the opposite from the applicants' claimed invention, because Thaler '331 requires two cold-air flow controlling switches according to claim 1 of Thaler '331 and the "Summary of the Invention" section in column 1 of Thaler '331 instead of a single cold air flow controlling switch according to appellants' claim 13.

A prior art reference that teaches the opposite from a claimed invention should not be combined with other prior art references under 35 U.S.C. § 103 (a) to reject the claimed invention as obvious. See M.P.E.P. 2145. X and also the Federal Circuit Court of Appeals has said:

"That the inventor achieved the claimed invention by doing what those skilled in the art suggested should not be done is a fact strongly probative of nonobviousness." in *Kloster Speedsteel AB v. Crucible Inc.*, 230 U.S.P.Q. 81 (Fed. Cir. 1986), on rehearing, 231 U.S.P.Q. 160 (Fed. Cir. 1986)

Furthermore when the combined subject matter of claims 11 and 13 is considered in view of the combined subject matter disclosed in the prior art, which is required according to M.P.E.P. § 2141.02 (the claimed invention must be considered “as a whole”), it should be apparent that the combined subject matter provides unusual and unexpected benefits in which of the combined prior art. The selection of a toggle switch for the cold air flow switch at the juncture between the conventional handle and the barrel of the dryer provides special benefits and advantages for those who want to hold the dryer by the barrel but manipulate the control switches, particular for the air flow, with a single finger of the hand that grips the barrel. Thus the combination of the toggle switch, its placement, and the insulation provided on the barrel provide a dryer with unexpected advantages for those who want to hold the dryer by the barrel.

For the aforesaid reasons Honorable Board of Patent Appeals and Interferences is respectfully requested to overturn the rejection of claim 11 as unpatentable under 35 U.S.C. § 103 (a) over US Patent 5,727,331, Thaler, et al, in view of US 4,711,988, Thaler, et al, and further in view of JP 03 009 703 A, Kaeriyama, and further in view of Gallone.

**F. Rejection of Claim 12 under 35 U.S.C. § 103 (a) over
Thaler '331, in view of Thaler '988, Kaeriyama, and Berryman**

Claim 12 was rejected as unpatentable under 35 U.S.C. § 103 (a) over US Patent 5,727,331, Thaler, et al, in view of US 4,711,988, Thaler, et al, and further in view of JP 03 009 703 A, Kaeriyama, and further in view of Berryman.

Berryman does disclose a barrel structure with concentric tubes in a similar apparatus to a hair dryer (but not a hair dryer, a heat gun) that is similar to the barrel structure according to claim 12.

However the combined subject matter according to claim 12 comprises the subject matter of claim 13 as well as that of claim 12 because of its dependence on claim 13. Thus the combined subject matter of claim 12 includes the following limitations not present in any of the combined prior art references used to reject claim 12:

“said barrel portion (5) is embodied as a second handle grip (9) that is insulated from the heater (3) to prevent said second handle grip (9) from getting hot during use;
a single cold air combination switch (16, 16.1, 16.2) is located only on the housing portion (6) between said first handle grip (8) and said barrel portion (5) at the angle formed by the first handle grip (8) and the barrel portion (5);
and

said cold air combination switch (16, 16.1, 16.2) is configured to be actuated selectively from the first or second handle grip (8, 9), by direct contact between the cold air combination switch and one finger of a hand on either the first handle grip (8) or the second handle grip (9)”

Thus claim 12 is not *prima facie* obvious from the combined prior art references, Thaler ‘331, Thaler ‘988, Kaeriyama, and Berryman, for the same reasons as presented in section C above, since the hair dryer of Barryman does **not** have:

- (1) an insulated barrel portion;
- (2) any control switches of any kind located at the juncture between the handle 53 containing the blower motor and the barrel portion (nozzle 50); and
- (3) there is no way to grip the barrel portion of the heat gun of Berryman in operation and operate the toggle switch 17 of Berryman with a single finger of the hand gripping the barrel portion.

Because Berryman does not disclose or suggest features 1 and 3 above, it does not suggest the features that were absent from the hair dryers disclosed by Thaler ‘331 and Thaler ‘988.

For the aforesaid reasons Honorable Board of Patent Appeals and Interferences is respectfully requested to overturn the rejection of claim 12 as unpatentable under 35 U.S.C. § 103 (a) over US Patent 5,727,331, Thaler, et

al, in view of US 4,711,988, Thaler, et al, and further in view of JP 03 009 703 A, Kaeriyama, and further in view of Berryman.

**G. Rejection of Claim 14 under 35 U.S.C. § 103 (a)
over Thaler '331, in view of Thaler '988 and Berryman**

Claim 14 was rejected as unpatentable under 35 U.S.C. § 103 (a) over US Patent 5,727,331, Thaler, et al, in view of US 4,711,988, Thaler, et al, and further in view of Berryman.

Berryman does disclose a barrel structure with concentric tubes in a similar apparatus to a hair dryer (but not a hair dryer, a heat gun) that is similar to the barrel structure according to claim 14.

However the subject matter according to claim 14 comprises the combined subject matter of claims 12 and 13, except that the feature that the barrel is insulated is omitted from claim 14. Thus the combined subject matter of claim 14 includes the following limitations not present in any of the combined prior art references used to reject claim 14:

"a single cold air combination switch (16, 16.1, 16.2) is located only on the housing portion (6) between said first handle grip (8) and said barrel portion (5) at the angle formed by the first handle grip (8) and the barrel portion (5); and
said cold air combination switch (16, 16.1, 16.2) is configured to be actuated selectively from the first or second handle grip (8, 9), by direct contact

between the cold air combination switch and one finger of a hand on either the first handle grip (8) or the second handle grip (9)"

Thus claim 12 is not *prima facie* obvious from the combined prior art references, Thaler '331, Thaler '988, Kaeriyama, and Berryman, for the same reasons as presented in section C above, since the hair dryer of Barryman does not have:

- (1) any control switches of any kind located at the juncture between the handle 53 containing the blower motor and the barrel portion (nozzle 50); and
- (2) there is no way to grip the barrel portion of the heat gun of Berryman in operation and operate the toggle switch 17 of Berryman with a single finger of the hand gripping the barrel portion.

Because Berryman does not disclose or suggest these features, it does not suggest the features that were absent from the hair dryers disclosed by Thaler '331 and Thaler '988.

For the aforesaid reasons Honorable Board of Patent Appeals and Interferences is respectfully requested to overturn the rejection of claim 14 under 35 U.S.C. § 103 (a) over US Patent 5,727,331, Thaler, et al, in view of US 4,711,988, Thaler, et al, and further in view of Berryman.

VIII. Claims Appendix

A clean copy of the pending claims on appeal follows herein below.

3. The hand hair dryer in accordance with claim 13, wherein the barrel portion (5) is heat-insulated from the outside.

4. The hand hair dryer in accordance with claim 13, wherein the second handle grip (9) and the barrel portion (5) are embodied as heat-insulated from the outside.

5. The hand hair dryer in accordance with claim 13, wherein the second handle grip (9) is shaped cylindrically.

6. The hand hair dryer in accordance with claim 13, wherein the first and second handle grips (8, 9) are each provided with a nonslip surface (13).

9. The hand hair dryer in accordance with claim 13, wherein the cold air combination switch (16) is a pushbutton (17).

10. The hand hairdryer in accordance with claim 13, wherein the cold air combination switch (16.1) is a one-legged toggle switch (18).

11. The hand hairdryer in accordance with claim 13, wherein the cold air combination switch (16.2) is a two-legged toggle switch (19).

12. The hand hairdryer in accordance with claim 13,
wherein:

a centrally located warm-air conduit (28) and a coaxial cold-air conduit (29) are provided in the barrel portion (5);

the central warm-air conduit (28) is formed by a hollow-cylindrical barrel (30), in which the heater (3) is located;

the coaxial cold-air conduit (29) is formed by the barrel portion (5) and the hollow-cylindrical barrel (30); and

the central warm-air conduit (28) and the coaxial cold-air conduit (29) are acted upon by a cold air stream (31) of the fan (2) and, by means of the heater (3), a warm air stream outlet (32) is effected out of the central warm-air conduit (28), and a cold air stream outlet (33) is effected from the coaxial cold-air conduit (29).

13. A hand hairdryer (1) comprising:

an electric fan (2) located in a housing portion (6);

a first handle grip (8) comprising operator control elements (7) and connected to the housing portion (6); and

a barrel portion (5) containing an electric heater (3) and connected to the housing portion (6) at an angle of approximately 90° with respect to said first handle grip (8) wherein:

said electric heater (3) is located in line with said electric fan (2) for generating an air stream (4) from said barrel portion (5);

said barrel portion (5) is embodied as a second handle grip (9) that is insulated from the heater (3) to prevent said second handle grip (9) from getting hot during use;

a single cold air combination switch (16, 16.1, 16.2) is located only on the housing portion (6) between said first handle grip (8) and said barrel portion (5) at the angle formed by the first handle grip (8) and the barrel portion (5); and

said cold air combination switch (16, 16.1, 16.2) is configured to be actuated selectively from the first or second handle grip (8, 9), by direct contact between the cold air combination switch and one finger of a hand on either the first handle grip (8) or the second handle grip (9).

14. A hand hair dryer (1) comprising:

an electric fan (2) located in a housing portion (6);

a first handle grip (8) comprising operator control elements (7) and connected to the housing portion (6); and

a barrel portion (5) containing an electric heater (3) and connected to

the housing portion (6) at an angle of approximately 90° with respect to said first handle grip (8) wherein:

said electric heater (3) is located in line with said electric fan (2) for generating an air stream (4) from said barrel portion (5);

said barrel portion (5) is embodied as a second handle grip (9);

a single cold air combination switch (16, 16.1, 16.2) is located only on the housing portion (6) between said first handle grip (8) and said barrel portion (5) at the angle formed by the first handle grip (8) and the barrel portion (5);

said cold air combination switch (16, 16.1, 16.2) is configured to be actuated selectively from the first or second handle grip (8, 9), by direct contact between the cold air combination switch and one finger of a hand on either the first handle grip (8) or the second handle grip (9);

a centrally located warm-air conduit (28) and a coaxial cold-air conduit (29) are provided in the barrel portion (5);

the central warm-air conduit (28) is formed by a hollow-cylindrical barrel (30), in which the heater (3) is located;

the coaxial cold-air conduit (29) is formed by the barrel portion (5) and the hollow-cylindrical barrel (30); and

the central warm-air conduit (28) and the coaxial cold-air conduit (29) are acted upon by a cold air stream (31) of the fan (2) and, by means of the heater (3), a warm air stream outlet (32) is effected out of the central warm-

air conduit (28), and a cold air stream outlet (33) is effected from the coaxial cold-air conduit (29).

IX. EVIDENCE APPENDIX

NONE

X. RELATED PROCEEDINGS

NONE

XI. SIGNATURE

In view of the foregoing, favorable allowance is respectfully solicited.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Michael J. Striker', with a long horizontal flourish extending to the right.

Michael J. Striker,
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